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IN THE

Supreme Court of the United States

October Term, 1957

No. 858

LOCAL NO. 149 OF THE AMERICAN FEDERATION OF TECHNICAL ENGINEERS (AFL),

PETITIONER

v.

GENERAL ELECTRIC COMPANY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ARGUMENT

The sole reason advanced by the petitioner in support of its application for certiorari is that the case "involves a question of vital import in the law applicable to the arbitrability of labor disputes under arbitration clauses in collective bargaining contracts" (Pet. p. 6). We submit that no such important question of federal law is presented. The only issue before the Court below was whether under the terms of the particular collective bargaining agreement in question the specific grievances filed by the Union were subject to arbitration. The decision turned on the terms of the precise contract and the nature of the specific grievances in issue. No federal question of general

application is involved. And it is not, and could not be, claimed that the decision below conflicts with a decision of another court of appeals or with any decisions of this Court.

The grievances in question related to job evaluation *i.e.*, what the appropriate wage grade should be for four "newly created jobs" (R. 9). The Union claimed that the jobs, which had been classified by the Company as "Grade 12", should have been classified as "Grade 13". Whether the Union was entitled to an order compelling arbitration depended upon whether the Company had agreed to arbitrate such a grievance. Determination of that question necessarily involved a construction of the arbitration provision of the Agreement, which was limited to any fully processed grievance "which involves the interpretation or application of this Agreement".

The Court below recognized, as it had earlier in *Local 205* v. *General Electric Co.*, 233 F. 2d 85, 101 (1st Cir. 1956), *aff'd* 353 U.S. 547 (1957), that an arbitration provision in a collective bargaining agreement might be so drawn as to refer to arbitration the very question of arbitrability of a grievance. Accordingly, it first looked to the arbitration clause in question to find whether, expressly or by implication, it put matters of arbitrability to the arbitrator for decision. Finding "nothing in the terms of the carefully guarded arbitration agreement" leading to such a conclusion, it then considered whether the grievances in question were arbitrable as involving "interpretation or application of this Agreement". It concluded that they were not.

The court's construction of the arbitration clause in question as not referring issues of arbitrability to arbi-

tration is in accord with other decisions construing almost identical arbitration clauses in collective bargaining agreements. *International Union* v. *Benton Harbor Industries*, 242 F. 2d 536 (6th Cir. 1957); *Davenport* v. *Proctor & Gamble Mfg. Co.*, 241 F 2d 511 (2d Cir. 1957); *Philadelphia Marine Trade Assoc.* v. *International Longshoremen*, 382 Pa. 326, 115 A. 2d 733 (1955). And, absent a provision in the agreement for arbitrating the issue of arbitrability, federal courts have consistently passed on that issue themselves when asked to compel arbitration of grievances under a labor contract. See, *e.g.*, *Engineers Association* v. *Sperry Gyroscope Company*, 251 F. 2d 133 (2d Cir. 1957); *Signal-Stat Corporation* v. *Local 475, United Electrical, Radio & Machine Workers of America*, 235 F. 2d 298 (2d Cir. 1956), *cert. denied* 354 U.S. 911; *Markel Electrical Products, Inc.* v. *United Electrical, Radio & Machine Workers of America*, 202 F. 2d 435 (2d Cir. 1953); *United Electrical Radio & Machine Workers of America* v. *Miller Metal Products, Inc.*, 215 F. 2d 221 (4th Cir. 1954); *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953); *Goodall-Sanford, Inc.* v. *United Textile Workers*, 233 F. 2d 104 (1st Cir. 1956); *aff'd* 353 U.S. 550; *Wilson Brothers* v. *Textile Workers Union*, 132 F. Supp. 163 (S.D.N.Y. 1954).

The petitioner seeks to have this Court create a new rule of law, that the trial court *must* refer the issue of arbitrability "in the first instance" to the arbitrator for determination unless the grievance in question is one specifically and clearly excluded from the arbitration clause. In other words, it would have this Court make a contract to arbitrate issues of arbitrability whether or not parties themselves have done so. The policy arguments it advances as to the advantages

allegedly to be derived from referring issues or arbitrability to the arbitrator, might be persuasive, as the court below observed (250 F. 2d 922, 927; Pet. p. 20), in inducing the parties to include terms in a collective bargaining agreement giving wide scope to the questions to be submitted to arbitration. But they furnish no warrant for rewriting the contract which was actually made by the parties. It might have been a good thing *if* the parties had made a different type of contract. Since they did not, courts cannot properly make new ones for them.

Despite its strictures against the "intrusion" of courts into the determination of questions of arbitrability, the petitioner itself, would apparently leave to the courts the ultimate determination of such questions. It urges merely that questions of arbitrability be determined by the arbitrator "in the first instance" (Pet., pp. 2, 11), "subject, however, to the right of the court to review such determination" (Pet., p. 12). The meaning of this suggestion is difficult to fathom. If courts are to review the merits of an arbitrator's decision on arbitrability, then reference to the arbitrator in the first instance would accomplish less than nothing. There would be *two* hearings on the same question instead of one, resulting in delays, and not a speeding up, of the arbitration process. Any such review would mean that "arbitration would fail of its chief purpose; instead of being a substitute for litigation, it would merely be the beginning of litigation" (*Coleman Company, Inc.* v. *International Union, United Automobile Aircraft and Agricultural Implement Workers of America*, 181 Kan. 969, — . 317 P. 2d 831, 837 (1957). See also *Burchell* v. *March*, 17 How. 344, 349 (1854)).

But manifestly there could be no effective judicial review of the arbitrator's determination of arbitra-

bility. In the absence of fraud or misconduct, his decision would necessarily be final. His determination that the issue was arbitrable, however unsound, would not be in excess of his jurisdiction because, by hypothesis, determination of the issue of his own jurisdiction would be committed to him. And the fact that his legal interpretation of the arbitration provision might be completely erroneous would not warrant judicial interference with his award, either under arbitration statutes or at common law. See *e.g., Wilko* v. *Swan*, 346 U.S. 427, 436-37 (1953); *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 203; *Richardson & Sons* v. *Hedges Transp. Corp.*, 98 F. 2d 55, 57 (2d Cir. 1938); *Mutual Health Benefit & Accident Ass'n* v. *United Casualty Co.*, 142 F. 2d 390, 393 (1st Cir. 1944); Sturges, Commercial Arbitration and Awards 798 (1930).

The conclusion of the Court below that the grievances in question did not involve the interpretation or application of the contract was plainly right. A labor agreement may define the methods to be followed in evaluating jobs for wage purposes or establish detailed job descriptions which can be applied in determining the applicable rate. Such provisions are not uncommon and they take a variety of forms. See *Cochran Foil Co.*, 26 L.A. 155, 157-158 (1956). But, as the Court below pointed out, the present contract contains no such provisions. Only by adding to the contract language which it does not contain — *i.e.* a description or definition of the jobs or duties encompassed in the various grades — could an arbitrator determine whether the duties performed by the employees in question were or were not those "encompassed in grade 13". This, however, an arbitrator is expressly forbidden to do under Article XV(2) of the Agreement, which denies

him any authority to add to or alter the provisions of the Agreement. See *Pacific Martime Assn. of Calif.*, 12 LA 1131 (1948).

Where, as here, the contract does not deal with the matter of how jobs are to be classified for wage rate purposes, either by defining the type of jobs or duties to which a given rate is applicable or by providing a method for evaluating and classifying jobs, labor arbitrators themselves have concluded that they could not resolve grievances as to the appropriate rate. The contract being silent on the problem, there was nothing for them to interpret or apply. See, *e.g.*, *Bliss & Laughlin, Inc.*, 11 LA 858 (1958); *Essem Packing Co., Inc.*, 7 LA 572 (1947); Baer Bros., 14 LA 487 (1950) Cf. *Chambersburg Engineering Co.*, 3 LA 254 (1946); *Kempsmith Machine Co.*, 5 LA 520 (1946).

In adopting the same approach, the court below did not manifest any stiff-necked, or "look-in-the-dictionary", attitude (Pet. p. 9). It fully recognized that under different collective agreements, as, for example, the one before this Court in *General Electric Company* v. *Local 205*, 353 U.S. 547 (1957), grievances as to the proper rate for jobs in a particular grade might well be arbitrable. All that it held was that the agreement here in question did not contain any language with respect to job descriptions and, therefore, there was nothing in the contract which could be "interpreted or applied" in determining whether the duties of a particular employee fell within any particular grade. That decision was right and fully in accord with decisions of labor arbitrators and other federal courts.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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